CRIMINAL PROCEDURE AND SENTENCING

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LEGISLATION

CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT ACT 6 OF 2010

The Criminal Law (Forensic Procedures) Amendment Act 6 of 2010 came into operation on 18 January 2013 (*GG* 36080). This Act will amend the Criminal Procedure Act 51 of 1977 by inserting ss 36A, 36B and 36C in Chapter 3 of the Act. In terms of these new provisions it will now be compulsory for police officials to take the fingerprints of certain categories of persons. The South African Police Service will also be able to retain and store these fingerprints and body-prints on a database, and the prints may also be used for the purposes of comparative (and cold-case) searches. This Amendment Act further provides for the integrity, operating procedures and general management of these databases.

CRIMINAL PROCEDURE AMENDMENT ACT 8 OF 2013, AMENDING SECTION 316 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

The Criminal Procedure Amendment Act 8 of 2013 was published in *GG* 36691 on 22 July 2013. This Act amends s 316 of the Criminal Procedure Act 51 of 1977 so as further to regulate applications for condonation, leave to appeal, and additional evidence, and to provide for matters connected therewith. The new s 316 is deemed to have come into operation on 10 September 2010.

Also see the discussion of *Sengama v S* 2013 (2) SACR 377 (SCA) and *Nabolisa v S* 2013 (2) SACR 221 (CC) below.

CORRECTIONAL SERVICES AMENDMENT ACT 5 OF 2011

The date of commencement of s 9 of the Correctional Services Amendment Act 5 of 2011, insofar as it relates to s 49G of the

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Correctional Services Act 111 of 1998, was set for 1 July 2013 in Proc 21 *GG* 36621 of 1 July 2013.

Section 49G of the Act provides that the maximum period of incarceration of a remand detainee may not exceed two years without the matter having been brought to the attention of the court concerned. This period is determined from the initial date of admission to the remand detention facility. It is furthermore provided that no remand detainee shall be brought before a court under s 49G, if he or she has appeared before a court three months immediately prior to the expiry of the two-year period, and that court has, at that appearance, considered the continued detention of the detainee.

Dangerous Weapons Act 15 of 2013

The Dangerous Weapons Act 15 of 2013 was published in *GG* 36704 on 24 July 2013 and will come into operation on a date to be determined by the President by proclamation in the *Government Gazette*. This Act repeals the Dangerous Weapons Act in the areas of the erstwhile South Africa, Transkei, Bophuthatswana, Venda and Ciskei. It also amends the Regulation of Gatherings Act 205 of 1993 and the Firearms Control Act 60 of 2000.

See, too, the discussion of the constitutional validity of certain provisions of the Dangerous Weapons Act 71 of 1968 in 2010 *Annual Survey* 363.

The National Policy Framework on the Management of Sexual Offences

The National Policy Framework on the Management of Sexual Offences, drafted in terms of s 62(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, was published on 6 September 2013 in GN R649, *GG* 36804. This National Policy Framework is a revised version of the first National Policy Framework tabled in Parliament in June 2011. The primary goal of the document is to provide for a collective effort between the various state departments in responding to and preventing sexual violence in all its manifestations.

The Policy Framework therefore seeks to establish coordinated planning, resource allocation and execution of services within the sexual offences sector. It entrenches the victim-centred CJS

(Criminal Justice System), and promotes specialisation in service delivery to respond to the special needs of the victims (s 7).

CASE LAW

Admission of guilt in terms of section 57 of the Criminal Procedure Act 51 of 1977

The accused in *S v Parsons* 2013 (1) SACR 38 (WCC) was persuaded to pay an admission of guilt fine on a complaint of 'disturbing the peace' (para [1]). The admission of guilt and payment of a fine are regulated by s 57 of the Criminal Procedure Act 51 of 1977, which stipulates that the payment of the fine and the return of the summons and written notice to the court having jurisdiction, would render the offender as duly convicted and 'such a conviction is regarded as a conviction for all statutory and common-law offences' (paras [2], [3]).

While the option to pay a fine and not appear before a magistrate is 'fatally attractive to an unsuspecting member of public', such action will lead to the offender having a criminal record and being regarded as duly convicted of the offence (paras [5]–[7]). Yet, many people who choose to pay the admission of guilt fine are not informed of the full extent of the consequences, and the accused in this case was unaware that it would result in her having a criminal record. The court furthermore found that the written notice to appear (in terms of s 56 of the Criminal Procedure Act 51 of 1977) did not make it clear that admission of guilt and the payment of a fine will translate into a conviction (para [6]). Justices Dlodlo and Mantame for the Western Cape High Court held that the written notice to appear 'needs improvement because, as it stands, it may not pass constitutional muster. It cannot be left to the police officer serving an accused person with the written notice to appear to also explain to such an accused person that the payment of the fine and admission of guilt would also lead to a conviction and criminal record' (para [6]).

The accused in this matter was found to have mistakenly admitted her guilt and the conviction was set aside (para [7]).

Also see *S v Tong* 2013 (1) SACR 346 (WCC) where the conviction was set aside as the police officer did not explain the implications of paying the admission of guilt fine to the applicant, and the matter did not therefore comply with the requirements of s 56 of the Criminal Procedure Act 51 of 1977.

Automatic Review in Terms of section 85(1) of the Child Justice Act 75 of 2008

Section 85(1) of the Child Justice Act 75 of 2008 provides for the automatic review of certain cases where the child was under the age of sixteen years at the time of the offence (s 85(1)*(a)*), or sixteen years and older but under the age of eighteen years and had been sentenced to any form of direct imprisonment that was not wholly suspended or any sentence of compulsory residence in a child and youth care centre as provided for in s 191(2)*(j)* of the Children's Act 38 of 2005 (s 85(1)*(b)*). While s 85 of the Child Justice Act 75 of 2008 mentions no requirement with regard to legal representation, the automatic review of the sentence referred to in s 85(1) must be conducted in terms of s 304 of the Criminal Procedure Act 51 of 1977, and s 302(3) of the latter Act stipulates that no right of automatic review exists in cases where the accused was legally represented at the trial (para [7]).

The central question in the case of *S v Sekoere* 2013 (2) SACR 426 (FB) was therefore whether a minor (sixteen to seventeen years of age), who had had legal representation throughout the trial and was sentenced to direct imprisonment, was entitled to the benefit of automatic review. The accused in this case pleaded guilty to a charge of housebreaking with the intent to steal and theft. He was legally represented and was sentenced, in view of his previous convictions, to twelve months' imprisonment (para [4]).

Justice Daffue for the Free State High Court, Bloemfontein, considered the history of the promulgation of the Child Justice Act 75 of 2008 in South Africa, as well as developments in the international arena with regard to child justice (paras [7]–[12]). Sections 82 and 83 of the Act specifically require that children in criminal proceedings be afforded legal representation at state expense — a right which may not be waived (para [13]). This legal assistance for minors in criminal proceedings is further defined and detailed in regulation 48 of GN 251 of *GG* 33067 of 31 March 2010. The effect of these provisions, it was held, makes it 'unthinkable, or at least highly unlikely, that a minor accused will ever be without legal representation' (para [14]).

Given this premium placed on the importance of legal representation for minors in criminal proceedings under the Child Justice Act (as also by the Constitution and international instruments) it was held that s 85(1) provides for an automatic review, even if the child had legal representation during the trial (para [19]).

Also see *S v Ruiter* (311/2010) [2010] ZAWCHC 265 (14 June 2011); *S v LM (Faculty of Law, University of the Western Cape: Children's Rights Project of the Community Law Centre and Others as amici curiae* 2013 (1) SACR 188 (WCC); *S v Fortuin* (38/2011) [2011] ZANCHC 28 (11 November 2011); *S v FM* 2013 (1) SACR 57 (GNP); and *S v CV* 2012 (1) SACR 595 (ECP).

For an opposing view see *S v Nakedi* (12/2012) [2012] ZANWHC 5 (2 January 2012) and *S v TS* 2013 (1) SACR 92 (FB).

Automatic Review in Terms of section 302 of the Criminal Procedure Act 51 of 1977

Section 302 of the Criminal Procedure Act 51 of 1977 makes provision for the automatic review of certain cases. Section 303 of the Act further provides peremptory provisions for the speedy transmission of the record and administration related to such an automatic review (para [2]). Yet, in *S v Cele* 2013 (2) SACR 146 (KZP) the matter was only referred for automatic review under s 302 of the Criminal Procedure Act 51 of 1977 six months after it had been finalised, and the accused sentenced to an effective three years' imprisonment (paras [1], [2]). By the time that the matter was heard, the accused had already spent ten months in prison (para [5]).

Justice Steyn for the Kwa-Zulu Natal High Court, Pietermaritzburg, held that this six months' delay defeated the purpose of the automatic review procedure which is aimed at ensuring that the proceeding was in accordance with justice (para [2]). He further held that the system of automatic review should be valued as a form of protection of the fundamental rights of an accused and should not be compromised by administrative incompetence (para [5]; also see *S v VC* 2013 (2) SACR 146 (KZP)). In reviewing all the circumstances of the case and the factors taken into consideration in sentencing, the accused's sentence was set aside and replaced by a term of eighteen months' correctional supervision in terms of s 276(1)*(h)* of the Criminal Procedure Act 51 of 1977.

Bail

The appellants in *Memeza and others v S* (A310/2012) [2013] ZAFSHC 27 (14 March 2013), were arraigned on two counts of robbery with aggravating circumstances; one count of housebreaking with the intent to steal and attempted theft; and two

counts of possession of unlicensed semi-automatic firearms. The appellants failed in their application for bail as well as the appeal against the refusal of their bail application (para [1]). A second bail application based on new facts was also denied, and it is the appeal against the refusal of this second bail application that forms the basis of this judgment.

The second bail application was brought after certain of the state witnesses had testified, but before the state had closed its case (para [4]). The trial magistrate dismissed this second bail application indicating that it was not possible for the court to make a definite ruling on the probative value of the new facts on which the second bail application was based, and that the strength of the state's case could not be determined as the state had not yet closed its case (para [4]).

With reference to an unreported case by the Supreme Court of Appeal, *Mooi v State* [2012] ZASCA 79, 30 May 2012 (case no 162/12) Justice Molemela for the Free State High Court, Bloemfontein, held that a court can determine the strength of a case against an accused before the state has closed its case (para [6]). It was held that

> This is not surprising at all. Clearly, the fact that the State's case has not yet been closed serves as no bar to the assessment of its strength. If this assessment can be done in a bail application launched before the beginning of the trial, on the basis of evidence adduced by or an affidavit deposed to the investigating officer, there is no reason why it cannot be done after the commencement of the trial but before the closure of the State's case (para [6]; also see *S v Vermaas* 1996 (1) SACR 528 (T)).

See further, *Prinsloo v S* (613/2013) [2013] ZASCA 178 (29 November 2013).

Declaring a Person a Habitual Criminal in Terms of section 286(1) of the Criminal Procedure Act 51 of 1977

Section 286(1) of the Criminal Procedure Act 51 of 1977 provides for a court to declare an offender a habitual criminal if it is satisfied that the offender habitually commits offences and that the community should be protected against him or her. This declaration can be made in lieu of the imposition of any other punishment for the offence or offences of which the offender stands convicted. The requirements for a declaration under s 286(1) of the Criminal Procedure Act 51 of 1977 were set out in *S v Van Eck* 2003 (2) SACR 563 (SCA) par [9]:

- the court must be satisfied that the offender habitually commits crimes and that the nature of the crimes necessitates the protection of the community (*S v Makoula* 1978 (4) SA 763 768B–E);
- the accused must be older than eighteen years of age; and
- punishment that does not exceed fifteen years' imprisonment must be warranted.

However, despite these requirements, the court retains a discretion whether or not to issue a declaration in terms of s 286(1) of the Criminal Procedure Act 51 of 1977 (para [9]). Further, although it is not required that an accused be warned of the risk of being declared an habitual criminal before such a declaration is made, and the fact that such a warning was not given, does not impact on a court's discretion to declare an offender a habitual criminal. However, it is settled practice not to declare a person a habitual criminal without prior warning, save for exceptional circumstances (para [10]; *S v Magqabi* 2004 (2) SACR 551 (E)).

With regard to the parole of habitual criminals, s 65(4)*(b)*(iv) of the Correctional Services Act 8 of 1959 provides that such an offender who has been declared a habitual criminal shall be detained in prison and only becomes eligible for parole after a period of at least seven years, but shall not be detained for a period exceeding fifteen years' imprisonment (para [6]); also see *S v Niemand* 2001 (2) SA CR 654 (CC)).

The appellant in *Smith v S* (A02/2013) [2013] ZAFSHC 120 (27 June 2013) was declared a habitual criminal in terms of s 286(1) of the Criminal Procedure Act 51 of 1977. He was first convicted at the age of nineteen years, and eight further convictions followed in quick succession. Thereafter, the appellant's convictions were more widely spaced: first a period of two and a half years without a conviction; then five and a half years; which was followed by another period of two and a half years and another period of four and a half years (paras [23], [24]). In total, the appellant was convicted of eleven crimes over a period of 25 years (para [27]). However, no information was provided to the court on the appellant's personal circumstances, or on the reason for the long periods between his convictions in later years (paras [24], [25]).

Justice Snellenburg of the Free State High Court, Bloemfontein, held that the appellant's previous convictions did not in itself warrant a declaration as a habitual criminal, and that the sentencing court

had not given sufficient weight to the appellant's personal circumstances (para [29]) — especially after the court in *S v Masisi* 1996 (1) SACR 147 (O) required 'a more careful enquiry and investigation into the personal circumstances, including the nature and frequency of criminal conduct in the past, the kind of punishment metered out and its apparent effect' (para [17]).

What Constitutes a Crime of Passion?

A crime of passion is an offence committed 'without rational reflection . . . whilst the perpetrator was influenced by [a] barely controllable emotion' (*S v Mvamvu* 2005 (1) SACR 54 (SCA) 59). It is an action born 'spontaneously . . . from provocation, driven by anger without sufficient time to consider [the consequences of the] actions' (*Dikana v S* [2008] 2 All SA 182 (E) 186).

In *S v Mgibelo* 2013 (2) SACR 559 (GSJ) the court had to decide whether the accused's actions amounted to a crime of passion and therefore constituted a substantial and compelling circumstance that warranted a lesser sentence. The accused planned and deliberately set fire to the shack in which her ex-boyfriend, his girlfriend and their child were sleeping. The accused's ex-boyfriend died from his burn wounds and the accused was convicted of murder, arson and attempted murder (para [1]).

The court described the accused's actions as 'callous, cruel and brutal . . . pure savagery . . . [and] the deceased succumbed to his painful injuries with his body almost unrecognisable while the surviving victim was left scarred for life' (para [5]). The accused's *modus operandi* was furthermore described as driven by revenge or vengefulness, well planned, and executed over a period of at least sixteen hours (paras [6], [8]). The accused did not use this time to 'cool off', and even after she had set the shack alight and the deceased and his girlfriend were fighting for their lives, she expressed her desire to 'finish off the deceased' (para [8]). This behaviour, it was held, does not constitute a crime of passion (para [12]; also see *S v Rosslee* 2006 (1) SACR 537 (SCA)).

The constitutionality of section 136(1) of the Correctional Services Act 111 of 1998

The applicants in *Broodryk and others v Minister of Correctional Services and others* (6958/11) [2013] ZAGPPHC 280

(9 September 2013), challenged the constitutionality of s 136(1) of the Correctional Services Act 111 of 1998, claiming that the provision is inconsistent with the provisions of s 35(3)*(n)* of the Constitution of the Republic of South Africa, 1996, as it infringes on their right to a fair trial, including the right to 'benefit from the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing'.

The applicants were serving determinate sentences imposed on them after 1 October 2004, and were, in terms of s 73(6)*(a)* of the Correctional Services Act 111 of 1998, therefore eligible to be considered for release on parole after having served half of their sentence. Section 73(6)*(a)* of the Act stipulates that offenders serving a determinate or cumulative sentence of more than 24 months must be considered for release on parole after having either served the fixed non-parole period, or if no non-parole period was fixed, half of the sentence or 25 years of the sentence imposed.

Section 136(1), on the other hand, applies to sentences imposed after 1 October 2004 and allows for the policy and guidelines of the former Parole Boards to apply. This allows for prisoners to be allocated the maximum number of credits in terms of s 22A of the Correctional Services Act 8 of 1959. In terms of this erstwhile framework for parole — which was in place when the applicants committed their offences, but not when they were sentenced — the applicants would have been eligible for parole after having served one third of their sentences, thereby providing for a shorter term of incarceration than the current parole policies.

Considering the case law over the past four years dealing with the application of the various parole policies of the Department of Correctional Services, Justice van Oosten for the Gauteng High Court dismissed the application (paras [4]–[9]; *Van Vuren v Minister of Correctional Services and Others* 2012 (1) SACR 103 (CC); *Makaba v The Minister of Correctional Services and others* FSHC 16 August 2012 (case no 5369/2011); *Van Wyk v Minister of Correctional Services and Others* 2012 (1) SACR 159 (GNP). Also see the Canadian cases of *R v Gamble* [1988] 2 SCR 595 and *Caruana v Director of Bath Institution, Commissioner of Corrections and Attorney General of Canada* 2002 CanLII 49628 (ON SC)). He stated that the correct interpretation of the word 'punishment' in s 35(3)*(n)* of the Constitution, 1996, does not

include an extended meaning that includes the serving of sentences or the way in which punishment is served, but rather refers to the prescribed punishments imposed on an accused after conviction (para [11]). The date of sentencing is consequently the operative date for purposes of determining parole eligibility and also in terms of the protection that s 35(3)*(n)* of the Constitution provides (para [12]).

Defining 'Correctional Supervision' in Terms of section 276(1)*(h)* of the Criminal Procedure Act 51 of 1977

The accused in *S v BL* 2013 (1) SACR 140 (GNP), a sixteen-year-old minor, was convicted of robbery with aggravating circumstances and sentenced to three years' correctional supervision in terms of s 276(1)*(h)* of the Criminal Procedure Act 51 of 1977 (para [4]). The trial magistrate, however, failed to determine the nature and scope of the correctional supervision.

It was held, on review, that the term 'correctional supervision does not connote a sentence, but refers to a collective term used to describe various measures which have in common that they are all applied outside prison, such as monitoring, house arrest, community service, placement in employment or rehabilitation programmes' (para [8]). It is therefore not enough for a magistrate to sentence an offender to correctional supervision without identifying the specific measures applicable to the offender and without formulating the general framework within which the measures should be implemented (para [9]).

Disparity in Sentences Imposed on Offenders who Participated in the Same Crime and Whose Personal Circumstances were Materially the Same

In *Abrahams v S* (A520/2012) [2013] ZAWCHC 201 (19 March 2013), the appellant and two further accused (Paulse and Woodman) pleaded not guilty to a charge of robbery with aggravated circumstances in the Cape Town Regional Court. During the course of the trial Woodman changed his plea to guilty, and his trial was separated from the trials of Paulse and the appellant. The appellant and Paulse were eventually convicted and sentenced to eight years' imprisonment of which two years were suspended on certain conditions (para [2]). Woodman, who had pleaded guilty, was, however, sentenced to only four years' imprisonment, suspended for five years on certain conditions,

including that he submit himself for rehabilitation for his drug dependency (para [3]). The appellant consequently applied for leave to appeal and leave to adduce further evidence relating to the differences in sentence imposed on Woodman and himself. The trial magistrate granted the leave to appeal but also indicated that even if she had been aware of the sentence imposed on Woodman, it would not have influenced her as she did not agree with the sentence that Woodman had received (para [4]).

Central to the grounds of appeal was the startling disparity between the sentence imposed on Woodman and the sentence imposed on the appellant. It was evident from the evidence and testimony, that it was Woodman who had initiated the robbery by first drawing a knife, and he was also the person who had stabbed the complainant after he had handed over his cell phone as ordered. Yet, the appellant argued, Woodman received a non-custodial sentence while the appellant, who was an accomplice responsible for driving the getaway vehicle and who had no interaction with the complainant, received a custodial sentence of six years (para [9]).

These two sentences were not only strikingly different, but it was also submitted that they were '. . . inversely proportional to the gravity of the actions sought to be penalised in that [Woodman] who played the palpably more active and blameworthy role in the robbery received a substantially lesser sentence' (para [9]). It was further argued that Woodman's personal circumstances which were taken into account as mitigating circumstances in his case, were materially the same as those of the appellant. Both were very young, first offenders, and both were addicted to tik (para [10]).

In *S v Giannoulis* 1975 (4) SA 867 (A) it was held that a disparity in the sentences imposed on participants to an offence would not necessarily warrant interference on appeal. 'Uniformity,' it was found, 'should not be elevated to a principle, at variance both with a flexible discretion in the trial court and with the accepted limitation of appellant interference therewith' (para [12]). However, where a disturbing disparity between the sentences exists, and the offenders' degrees of participation were more or less equal and there are no substantial and compelling circumstances warranting the disparity, then an appeal court may, depending on the circumstances of the particular case, interfere with the sentence imposed. It was warned, however, that such interference should not be aimed at equating the sentences, but rather at doing what is appropriate in the circumstances (para [12]).

With due consideration to all the circumstances surrounding this offence, as well as the personal circumstances of the appellant, Justice Boqwana for the Western Cape High Court found that the trial magistrate should have given more consideration to the influence that the appellant's drug addiction had played in his life choices and in the offence in particular (para [18] and see *Nel v S* 2007 (2) SACR 481 (SCA)). It was further found that the appellant was a 'clear candidate' for rehabilitation outside of the prison environment, and his sentence was accordingly amended to four years' imprisonment suspended for five years on the usual conditions, including that he submit himself to rehabilitation for his drug addiction (paras [21], [23]).

Entering a Minor's Name in the National Register of Sexual Offenders after a Conviction in Terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

In *Johannes v S* 2013 (2) SACR 599 (WCC) the accused, who was a fourteen-year-old minor at the time of the commission of the offence, was convicted on three charges of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and sentenced to five years' compulsory residence in a Child and Youth Care Centre in terms of s 76(1) of the Child Justice Act 75 of 2008 (paras [1]–[4]). The accused was also sentenced to an additional three years' imprisonment after the completion of the five years' compulsory residence in terms of s 76(3) of the Child Justice Act 75 of 2008. And, in respect of a conviction of assault with the intent to do grievous bodily harm, the accused was sentenced to a further six months' imprisonment suspended for a period of three years on condition that he was not convicted of assault during the period of suspension (paras [5], [6]).

An order was furthermore made in terms of s 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, that the accused's name be entered in the National Register for Sexual Offenders (para [7]). In terms of s 50(2)*(a)*(i) of the Act, a court must make an order that the particulars of a person be included in the Register if that person has been convicted of a sexual offence against a child or a person who is mentally disabled (para [12]).

In this matter, Justice Henney for the Western Cape High Court had to decide whether the sentencing court was competent to

make an order in terms of s 50(2) of the Sexual Offences Act if regard is had to the objectives of the Child Justice Act 75 of 2008 (particularly ss 2–4), as well as the provisions of s 28 of the Constitution of the Republic of South Africa, 1996 (para [8]). (Both the regional magistrate and the Director of Public Prosecutions Western Cape (DPP) recommended that an order in terms of s 50(2)*(a)*(ii) of the Sexual Offences Act was a competent order for the sentencing court to make (para [9]).

It was argued on behalf of the state that the sentencing court had no discretion to decline to make an order in terms of s 50(2), since the Sexual Offences Act does not distinguish between a child sexual offender and an adult sexual offender (para [53]). In *S v RB; S v DK* 2010 (1) SACR 447 (NCK), for example, it was held that the inclusion of the particulars of a minor in the register constitutes a justifiable limitation of the child offender's rights (para [62]). However, the serious inroads that the peremptory inclusion of an offender's particulars in the register make on his or her constitutional rights, including the rights to dignity, privacy, fair labour practices, and freedom of trade, occupation and profession, also had to be considered, especially where the offender was still a minor at the time of the commission of the offence (para [55]). It was further held that s 28 of the Constitution also protects the rights of children against degradation, and not to have their wellbeing and moral and social development put at risk (para [56]).

In this regard, the *amicus curiae* on behalf of the Centre for Child Law argued that the provisions of s 50(2) of the Sexual Offences Act violated a number of rights of minor offenders, and that it also undermined the objectives of the register itself (para [70]). The *amicus curiae* argued that the primary aim of the register is to protect children and persons with mental disabilities from predatory adults by limiting such adults' employment opportunities to job categories that would give them access to children or mentally disabled persons. It was further argued that the impugned provision does not correctly reflect this purpose, in that the state had failed to provide evidence to suggest that child offenders guilty of sexual crimes against their peers later became adult sex offenders who prey on children and/or the mentally disabled (para [75]).

The court ultimately held that a child offender cannot be regarded as less of a sex offender merely because of his or her age (para [115]).

> Such an offender will remain a sex offender, irrespective of whether such a person's particulars will be included in the Register or not. The mere fact that an offender is a child sex offender, in my view, is not sufficient justification per se for not having such a person's particulars entered in the Register. Under certain circumstances, it may well be that entering such details is a reasonable and justifiable limitation of the rights of such an offender, and this would be especially so where such a child sex offender might reasonably pose a threat or harm to children or mentally disabled persons. However, in my view, such decision to do so in the case of children, has to be constitutionally compliant and has to be a measure of last resort given the circumstances of a particular case (para [115]).

It was consequently held that the provisions of the Sexual Offences Act, including those regulating the inclusion of the offender's particulars in the register, also apply to all child offenders (para [118]). However, the court also concluded that there may be circumstances involving child sex offenders that do not call for the inclusion of his or her details in the register — especially as there is a broad range of offences that fall under the term 'sexual offence', some of which are not as serious as others. (para [122]). Section 50(2) of the Sexual Offences Act was therefore held to be overbroad in its quest to have all sexual offenders who commit sexual offences against children or mentally disabled persons included in the register (para [121]). It was held that courts should have a discretion whether or not to include the particulars of a sex offender in the register, and the offenders should furthermore be offered an opportunity to make representations to persuade the court whether or not to grant such an order (paras [126]–[131]).

Section 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 was consequently declared invalid and inconsistent with the Constitution in so far as it does not allow the court to inquire and decide, after affording the accused an opportunity to make representations, whether or not the particulars of the accused should be included in the National Register for Sexual Offenders (para [137]).

Estimating the Age of a Person — section 337 of the Criminal Procedure Act 51 of 1977 Read with sections 14 to 16 of the Child Justice Act 75 of 2008

Section 16 of the Child Justice Act 75 of 2008 provides that if at any stage during the proceedings, the presiding officer is satisfied, on the basis of evidence placed before him or her, that the

age of the accused is incorrect, this must be altered on the record of the proceedings in terms of s 14 of the Act.

How the unknown age of an accused person must be determined or estimated in the absence of conclusive proof thereof, remains unclear. Section 337 of the Criminal Procedure Act 51 of 1977 merely provides that the presiding officer can estimate the age of such a person based on his or her appearance or from any other information that may be available, and that the age so estimated shall be deemed to be correct unless it is subsequently proved to be incorrect (s 337*(a)*), or if the accused at such proceedings could not lawfully have been convicted of the offence with which he or she was charged if the correct age had been proved (s 337*(b)*).

But estimating the age of an accused based merely on his or her appearance is superficial, and clearly unscientific. As a matter of good policy, estimation of age based on appearance alone should resorted to only where the age of the accused is not really an issue in the outcome of the trial. Furthermore, in terms of method, appearance is, generally speaking, often misleading and indeed fallible as a (sole) indicator of age. Environmental factors, physical deprivation (including malnutrition), and substance abuse can all have an impact on a person's appearance, as well as his or her physical and mental development (for a detailed comment on s 337 of the Criminal Procedure Act, see A le Roux-Kemp in Du Toit et al *Commentary on the Criminal Procedure Act* (revision service 51, 2013) 33–14).

Recent case law also shows that presiding officers are not accessing the wide range of tools and potential sources of evidence available to determine the true age of an accused, and that the accused's supposed correct age is often amended on the court record without a proper eviential basis.

The applicant in *Mpofu v Minister for Justice and Constitutional Development and Cthers* 2013 (2) SACR 407 (CC) was convicted of murder and other serious offences committed in January 1998. He was sentenced to life imprisonment on the murder charge and 28 years' imprisonment for the other offences, the latter to run concurrently with the life term (para [4]). For the purpose of sentencing, the court *a quo* accepted that the applicant was twenty years of age at the time of sentencing and that he was in his late teens at the time of the commission of the offence (para [28]).

The applicant subsequently applied for leave to appeal against his sentence arguing, inter alia, that the court had failed to take

into account that he was a minor at the time of the commission of the offences (para [5]). He relied on s 28(1)*(g)* of the Constitution of the Republic of South Africa, 1996, which provides that a child may only be imprisoned as a matter of last resort and for the shortest possible period (para [7]).

While the Constitutional Court agreed that s 28 of the Constitution demands a different enquiry into sentencing — 'the starting point in sentencing may well be different . . . [t]his does not mean that every sentencing court must expressly refer to s 28, but its contents cannot be ignored' (para [22]) — the court failed to provide guidance on the determination of an offender's age for the purpose of criminal proceedings as set out in s 337 of the Criminal Procedure Act 51 of 1977 read together with ss 14–16 of the Child Justice Act 75 of 2008.

The Constitutional Court merely relied on the judgment of the court *a quo* and on the information collected by an *amicus curiae* appointed to investigate the age of the applicant. However, the *amicus curiae* did little more than try and find the applicant's birth certificate, and even this enquiry was not successful as the information provided by the Department of Home Affairs and the information obtained from the National Population Registry database did not match; the information indicated that the applicant was born in 1977, 1979 or 1981 and that he was between sixteen and twenty years old when the offences were committed (paras [8], [30]–[33]). No conclusion could consequently be reached on the applicant's age and it was held that the court *a quo* had misdirected itself as it appears from references in the judgment that the court accepted that the applicant was a child at the time he committed the offences but failed to take this into consideration in determining an appropriate sentence (paras [34], [47]).

In *S v Gxaleka* 2013 (2) SACR 399 (ECB), the fact that the accused was under the age of eighteen years only emerged during the trial when the complainant was cross-examined. The proceedings were consequently halted and the matter referred for review. In this case, Justices Van Zyl and Dukada for the Eastern Cape High Court, Bhisho, merely considered the testimony of witnesses as it appeared on the court record, and then stated that '[i]t seems . . . that the accused must have been older than ten years but under the age of eighteen years when he was arrested and detained' (para [15]). The matter was ordered to start *de novo* in accordance with the provisions of the Child Justice Act 75 of 2008 (para [24]).

A DUTY TO CROSS-APPEAL IN TERMS OF SECTION 316B OF THE CRIMINAL PROCEDURE ACT 51 OF 1977?

In *Nabolisa v S* 2013 (2) SACR 221 (CC) the Constitutional Court had to consider whether the state is obliged to cross-appeal in circumstances where an accused initiates an appeal against his sentence, or whether a notice in the state's heads of argument seeking an increase of the sentence, is sufficient. The appellant in this case appealed against his conviction and sentence to the Supreme Court of Appeal which upheld his conviction and increased his sentence from twelve to twenty years' imprisonment (para [1]). The state did not initiate a cross-appeal but indicated twice in its heads of argument, and also in its supplementary heads of argument, that the sentence should be increased (para [7]). The Supreme Court of Appeal agreed with this and held that the provisions of the minimum sentencing legislation should apply and, considering the seriousness of the crime and the fact that in most cases the courier of the drugs in this criminal scheme was caught while the handlers remained safe, that the sentence should be increased to twenty years' imprisonment (para [9]).

However, the appellant argued that s 316B of the Criminal Procedure Act 51 of 1977 creates a peremptory statutory requirement of cross-appeal by the state if the state seeks an increase in sentence on appeal (para [11]). It was further submitted that the practice that existed prior to 1990 (before s 316B of the Criminal Procedure Act was introduced) which allowed the state to merely request in its heads of argument for a sentence to be increased, was abolished by the introduction of s 316B and to allow for 'this old practice to continue would render s 316B superfluous, and would be absurd because it would allow the State to request an increase in sentence in instances where leave to appeal may have been refused' (para [12]). The appellant also argued that his sentence was not increased *mero motu* by the Supreme Court of Appeal, but in light of the state's notice in its heads of argument (para [13]).

The state, in turn, argued that s 316B merely fills a *lacuna* that existed in the law; previously the state was unable to appeal to rectify a sentence that was overly lenient when the accused had elected not to appeal, and s 316B now made it possible for the state to appeal at its own initiative (para [15]). Section 316B, it was submitted, does not remove the 'old practice' and the determination of a possible new sentence was already a live

issue before the Supreme Court of Appeal, irrespective of the notice in the state's head of arguments (para [15]).

Justice Skweyiya for the Constitutional Court (Moseneke and Van der Westhuizen concurring) confirmed the state's submission that s 316B was intended to fill a *lacuna* in the law by creating an independent right for the state to appeal and did not change the 'old practice by creating a duty on the state to cross-appeal where the accused initiated an appeal because, in those instances, the state would be before the court of appeal already' (para [26]). Section 22 of the Supreme Court Act 59 of 1959, read together with s 322 of the Criminal Procedure Act 51 of 1977, furthermore empowers a court of appeal to confirm, amend or set aside a judgment or order including the setting aside, reduction or increase of a sentence (para [27]). It was consequently concluded that s 316B of the Criminal Procedure Act 51 of 1977 'does not create a peremptory requirement for cross-appeal and the failure by the State to do so does not constitute an irregularity' (para [30]).

A Duty to Provide Legal Aid for Participants to a Commission of Inquiry?

The applicants in *Magidiwana and others v President of the Republic of South Africa and others* (CCT 100/13) [2013] ZACC 27; 2013 (11) BCLR 1251 (CC) represented members of a class of persons who were arrested or injured by members of the South African Police Service at the Marikana mine during August 2012. The applicants sought to secure funding to cover their legal and other expenses incurred in participating in the Marikana Commission of Inquiry, a Commission established by the President to investigate and report on 'matters of public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana' (para [1]).

Initially, the legal and other expenses incurred by the applicants with their participation in the Commission's proceedings were funded by a non-governmental organisation, The Raid Foundation. This funding, however, only covered the first six months of the Commission's activities and the applicants were unable to secure further funding (para [2]). Moreover, the Minister of Justice and Constitutional Developed declined their request for funding indicating that 'no legal framework [existed] through which government can contribute to the legal expenses of any of the parties who participate in the commission of inquiry' (para

[3]). Legal Aid South Africa also denied the applicants' request as this statutory body was already operating under severe budgetary constraints and its policy documents do not make provision for the funding of legal expenses incurred at commissions of inquiry (para [4]).

An application was consequently lodged with the High Court for the President, the Minister of Justice and Constitutional Development, and/or Legal Aid South Africa to provide the applicants with legal aid at state expense for the duration of the Commission's proceedings (para [5]). This application was, however, dismissed.

In a decision by the Constitutional Court, it was held that the South African Bill of Rights only makes explicit provision for a person to claim legal representation at state expense in the following three instances:

- A child has the right to have a legal practitioner assigned to him or her by the state and at state expense in all proceedings affecting the child and if substantial injustice would otherwise result (s 28(1)*(h)* of the Constitution, 1996).
- A detainee also has a right to a legal representative assigned to him or her by the state and at state expense if substantial injustice would otherwise result (s 35(2)*(c)* of the Constitution, 1996).
- Every accused's right to a fair trial includes the right to have a legal practitioner assigned to him or her by the state and at state expense if a substantial injustice would otherwise result (s 35(3)*(g)* of the Constitution, 1996).

The applicants clearly did not fall within any of these three categories of persons entitled to legal representation at state expense. However, the Constitutional Court agreed that unfairness may arise when adequate legal representation is not provided, and also held that it falls within the domain of state organs to ensure that legal aid is provided to participants when such commissions of inquiry are established (para [15]). The judiciary, however, has no power to order the executive branch of government how to deploy state resources, and since the applicants did not challenge the constitutionality of the provisions of the Legal Aid Act 22 of 1969, the application for leave to appeal had to be dismissed (para [16]).

Also see *Magidiwana and another v President of the Republic of South Africa and others* 2014 1 All SA 76 (GNP).

The Effect of the Amendment to S 316(10) of the Criminal Procedure Act 51 of 1977

Before the amendment of s 316(10) of the Criminal Procedure Act 51 of 1977, a court could not dispose of a petition without having received the full record of the trial. This resulted in considerable delays, a substantial backlog of petitions, and the incurring of substantial costs in preparing and lodging records. This was, above all, unnecessary as there was 'no practical need for records to be lodged before disposing of petitions as applicants are obliged in terms of s 316(4)*(a)* of the Criminal Procedure Act 51 of 1977 to set out clearly and specifically the grounds upon which leave to appeal is sought' (*Sengama v S* 2013 (2) SACR 377 (SCA) para [4]).

This situation has been remedied by the Criminal Procedure Amendment Act 8 of 2013 which amends s 316(10)*(c)* of the Criminal Procedure Act 51 of 1977, and does away with the obligation on the Registrar of a High Court who receives notice of a petition to automatically forward the record of the trial to the relevant court (para [5]). Registrars are now only obliged to do so if:

(i) the accused was not legally represented at the trial; or
(ii) the accused is not legally represented for the purposes of the petition; or
(iii) the prospective appeal is not against the sentence only; or
(iv) the judges considering the petition, in the interest of justice, request the record or only a portion of the record (s 316(10)*(c)*).

The 'or' in this provision should be read conjunctively, as if the word 'and' had appeared at that point, to give effect to the manifest purpose of the legislation which is to dispense with the need to file the record of the proceedings in most cases (para [7]). The only exceptions are when the accused was not legally represented at the trial, or where the accused is not legally represented for the purposes of the petition. In both these instances the Registrar is still obliged to furnish the record of the proceedings to the court on receiving the notice of a petition (para [8]).

An Exceptionally Long Determinate Sentence versus a Sentence of Life Imprisonment

The applicant in *Houston v S* 2013 (5) BCLR 527 (CC) sought leave to appeal against two sentences imposed on him in

separate cases in the KwaZulu-Natal High Court, Durban. Having been convicted of murder, kidnapping and robbery with aggravating circumstances in 1997, he was sentenced to an effective term of 30 years' imprisonment. And in February 1998, he was convicted on two counts of murder and two counts of robbery with aggravating circumstances and sentenced to an effective 40 years' imprisonment (para [1]). Although the cumulative effect of the two sentences was considered at the second trial, the sentences were not ordered to run concurrently, and the applicant was consequently sentenced to an effective 70 years' imprisonment (para [1]).

The applicant contended that the parole policies of the Department of Correctional Services in terms of this determinate sentence of 70 years' imprisonment unfairly discriminated against him (para [3]). Had he been sentenced to life imprisonment, for example, the applicant would already have been eligible for parole as he was sentenced before 1 October 2004 and his eligibility date for parole could therefore be advanced by credits as per earlier legislation (para [5] and see *Van Vuren v Minister of Correctional Services and Others* 2012 (1) SACR 103 (CC)). With a determinate sentence, however, the applicant would only become eligible for parole after having served a third of his sentence which amounts to more than 23 years in prison (para [4]). Ironically, the sentencing court considered the appropriateness of a sentence of life imprisonment in this case, but found that a life sentence is only appropriate where there are no prospects of rehabilitation (para [4]). Thus, while the sentencing court recognised the possibility of rehabilitation for the applicant, the end result of the sentence imposed is an effective term that is longer than the term that the applicant would have spent in prison had he been sentenced to life imprisonment.

However, despite the anomaly created with this determinate term of imprisonment, the Constitutional Court did not intervene in this matter and found that the appropriate remedy lies in seeking a review of the parole policies of the Department of Correctional Services (para [7]).

The Supreme Court of Appeal also chose not to interfere in what can be described as a Methuselah sentence of 275 years' imprisonment in *S v Mafoho* 2013 (2) SACR 179 (SCA). The appellant in this case was convicted on 60 counts involving robbery with aggravating circumstances, attempted murder, kidnapping, rape, attempted rape and pointing of a firearm (para

[2]). The Supreme Court of Appeal refused to replace the appellant's determinate sentence with a term of life imprisonment, stating that it is unable to substitute a sentence with one which the trial court did not have the competency to impose at the time (para [7]). It was furthermore held that life imprisonment was not the prescribed sentence for any of the offences for which the appellant was convicted (para [8]).

All the relevant parole policies from s 65(4) of the Correctional Services Act 8 of 1959 to ss 73(6)*(a)* and 136(1) of the Correctional Services Act 111 of 1998 and the Parole and Correctional Supervision Amendment Act 87 of 1997 were also considered (paras [9]–[20]). It was evident from the analysis of all the relevant provisions that the appellant was eligible for consideration to be released on parole after having served 25 years of his term of imprisonment (para [21]). And, since this is effectively the same period that applies to prisoners sentenced to life imprisonment, the matter was found to be moot (para [21]).

This decision was criticised in *Mahlatsi v S* 2013 (2) SACR 625 (GNP) (discussed below) as Justice Lamprecht for the North Gauteng High Court pointed out that the Supreme Court of Appeal had failed to take into consideration the important differences between determinate sentences and a term of life imprisonment when it comes to parole. First, it was held that there is no guarantee that prisoners will be released on parole after having served 25 years of their sentences as the legislative and policy framework only requires that they be considered for release on parole at this time. Furthermore, the Minister releases prisoners sentenced to life imprisonment on parole, while the Parole Board makes the parole decisions for prisoners serving determinate sentences (para [26]). This, coupled with the jurisprudence of the Supreme Court of Appeal itself — stipulating that 'the sentence imposed must be one which the court intends as the ultimate punishment that should be served' — and that sentencing courts should not therefore consider the possibility of release on parole when determining an appropriate sentence, led to the North Gauteng High Court questioning whether the decision in *Mafoho* is binding (para [26]).

As is evident from this critique of the *Mafoho* decision, Justice Lamprecht for the North Gauteng High Court took a more decisive stand on the matter in *Mahlatsi v S* 2013 (2) SACR 625 (GNP). The appellant in this case was convicted on three counts of robbery with aggravating circumstances and one count of

kidnapping. He was sentenced to an effective term of 50 years' imprisonment (para [4]). While the appeal court could not find that the trial court had misdirected itself in any way, or that the sentences imposed on each count individually could be regarded as shocking or disturbingly inappropriate, it did find the cumulative effect thereof excessive (paras [8], [11]).

Justice Lamprecht explained that before the death penalty was abolished in South Africa, life imprisonment was seldom imposed, and almost never served to the end of a person's natural life. A term of life imprisonment was rather seen as a sentence equal to twenty years' imprisonment because such a prisoner would be considered for parole after having served twenty years of his or her sentence (para [12]). After the abolition of the death penalty, a trend developed of imposing single sentences, or effective sentences in excess of 25 years. The reasoning behind these sentences was that judicial officers wanted to ensure that criminals whom they regarded to be a danger to society, would not be released on parole after having served only twenty years of their sentence (para [12]).

It was consequently concluded that no sentence should be longer than life imprisonment as this is the most severe sentence that can be imposed in the Republic of South Africa (para [21]). Even where more than one life term is imposed, it will be regarded as one sentence of life imprisonment (para [21]). And, although s 73(1)*(b)* of the Correctional Services Act 111 of 1998 provides that a person sentenced to life imprisonment will remain in prison for the rest of his or her natural life, the parole release policies to which s 73(1)*(b)* is subject, provide that a person sentenced to life imprisonment must serve at least 25 years of the sentence or, upon reaching the age of 65 years, be considered for parole after having served at least fifteen years of the sentence (s 73(6)*(b)*(iv)). A person sentenced to life imprisonment is furthermore not released on parole by the Parole Board, but on application to the Minister and after the Minister has considered the Board's recommendation (s 73(5)*(a)*(ii)). Two further statutory provisions also confirm 25 years as the maximum possible term of imprisonment before parole must be considered. First, s 276B(1)*(b)* of the Criminal Procedure Act 51 of 1977 provides that the maximum non-parole period a court can fix is either two-thirds of the sentence or 25 years, whichever is the shorter. And with regard to offences to which prescribed minimum sentences apply, it is stipulated that offenders sentenced in

terms of s 51 of the Criminal Law Amendment Act 105 of 1997, may not be released on parole before at least four-fifths of the sentence or 25 years have been served, whichever is the shorter (s 73(6)*(b)*(v)).

It is therefore clear that the maximum effective term of imprisonment that must be served before a convict must be considered for release on parole is 25 years, and any punishment heavier than this should not be considered lightly (paras [25], [28]). The appellant's sentence in this case was consequently amended to an effective term of 37 years imprisonment, which means that the appellant will be considered for parole after having served a period of 25 years (para [38] and see *Zondo v S* (627/12) [2013] ZASCA 51 (28 March 2013).

Mthimkhulu v S 2013 (2) SACR 89 (SCA) and *Mchunu and another v S* (825/2012) [2013] ZASCA 126 (25 September 2013) deal with fixed non-parole periods in terms of s 276B(2) of the Criminal Procedure Act 51 of 1977. And in *Silo v S* (CA & R 4/2011) [2013] ZAECGHC 60 (11 May 2013), the appellant was sentenced to an effective 25 years' imprisonment. It was emphasised that long terms of imprisonment should be reserved for more serious offences, and that the effective term of imprisonment should be measured against the purpose of the imposition of such an extremely long term (paras [17]–[19]). In this latter case it was also held that the failure properly to consider the cumulative effect of a sentence imposed constitutes a misdirection sufficient to attract interference (para [20]).

Factors to be Taken into Consideration for the Cancellation or Suspension of a Driver's Licence in Terms of S 35(3) of the National Road Traffic Act 93 of 1996

Section 35(3) of the National Road Traffic Act 93 of 1996 requires of a court, having convicted a person of an offence referred to in s 35(1), and after the presentation of evidence under oath, to consider the suspension or disqualification of that person's driving licence. In *S v Swartz* (86/2013) [2013] ZAFSHC 93 (13 June 2013) the following factors were listed for consideration at such a s 35(3) enquiry.

Points of departure:

- The aim of the cancellation or suspension of a licence is to advance the public good and should be regarded as a significant part of the sentence (*S v Van Rooyen* 2012 (2) SACR 141 (ECG) para [29]).

- Thus, although the suspension or cancellation of a licence is in the nature of punishment, its prime objective is to protect the public (*S v Maloney* 1968 (2) SA 281 (O) 282F–G and *R v Retief* 1960 (3) SA 258 (O) 262D–E).
- Section 34, which provides for a discretionary suspension or cancellation of a driving licence, and s 35, which provides for the mandatory suspension or cancellation of a driving licence, should be read together and are not mutually exclusive (*S v Van Rooyen* 2012 (2) SACR 141 (ECG) paras [10]–[12]).
- Courts should be reluctant to order non-suspension, and the suspension of the licence for the prescribed period should be the point of departure in all cases (*S v Wilson* 2001 (1) SACR 253 (T) 259g–h).

The Supreme Court of the State of New Jersey (USA) requires that the following factors be taken into consideration

(1) The nature and circumstances of the accused's conduct, including whether the conduct posed a high risk of danger to the public or caused physical harm or damage to property;
(2) the accused's driving record including age and duration of time as a licensed driver, and the number, seriousness, and frequency of previous infractions;
(3) whether the accused did not commit any driving offences for a substantial period before the most recent violation or whether the nature and extent of the driving record indicates that there is a substantial risk that he or she will commit another violation;
(4) whether the character and attitude of the accused indicate that he or she is likely or unlikely to commit another violation;
(5) whether the accused's conduct was the result of circumstances unlikely to recur;
(6) whether a licence suspension would cause excessive hardship to the accused and/or dependents; and the need for personal deterrence; and
(7) any other relevant factor clearly identified by the court may be considered as well (*State of New Jersey v Laura Moran* 202 NJ 311; 997 A. 2nd 210; 2010 NJ Lexis 588).

In the South African case of *S v Mofokeng* 1964 (1) SA 242 (O) 243H the following factors were also taken into consideration:

- the traffic conditions at the time of the offence;
- whether or not an accident had occurred;
- whether the life of a road user was placed in danger;
- speed of travel;
- the number and ages of passengers in the accused's vehicle;
- the driving ability of the accused.

The court also emphasised that, in terms of South African law, the personal circumstances of an offender carry little or no weight in a s 35(3) enquiry. This is evident from the points demerit system which has already been implemented in Pretoria and Johannesburg, and allows for points to be subtracted from a driving licence in terms of the offence committed (Administrative Adjudication of Road Traffic Offences Act 46 of 1998). As well as from the previous position under s 146*(a)* of Ordinance 21 of 1966 where 'endorsement was a substantive sanction which a court had the power to order irrespective of whether suspension or cancellation was ordered' (para [13]).

Greater Clarity Needed on 'Substantial and Compelling Circumstances'

In *Fortune v S* (A(R) 48/13) [2013] ZAWCHC 179 (22 November 2013), the appeal against a sentence was referred to the Western Cape High Court as the magistrate felt that greater clarity was needed on what constitutes 'substantial and compelling circumstances', and that a number of sentences imposed had been reduced on appeal by the Western Cape High Court (para [1]).

In *S v Malgas* 2001 (2) SA 1222 (SCA) it was held that

> If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence (para [40]).

This and the other sentencing principles set out in the *Malgas* case, are now '. . . well established in our criminal law jurisprudence' (para [3] and see *Director of Public Prosecutions, Kwazulu-Natal v Ngcobo* 2009 (2) SACR 361 (SCA)). Nonetheless, difficulty is experienced in the application of these principles, and 'what appear to be incomensurate sentences, are in many cases explicable by the realities that no one case is exactly like another' (para [4]).

Binns-Ward for the Western Cape High Court also observed that 'the individualisation of the sentencing process in matters in which the prescribed minimum sentences apply does result to some extent in the sentences imposed reflecting the individual attitudes of judicial officers towards the legislative dispensation' (para [4]). Sometimes judicial officers deviate too easily from the prescribed minimum sentences (*S v Matyityi* 2011 (1) SACR 40

(SCA) and *S v Nkunkuma* (101/13) [2013] ZASCA 122 (23 September 2013)), but courts have a duty to implement the prescribed minimum sentences despite their personal doubts or aversion to them (para [5] and *S v Matyityi* 2011 (1) SACR 40 (SCA) para [10]).

In *S v Kwanape* 2012 ZASCA 168 (26 November 2012) it was held that 'courts are duty-bound to implement the sentences prescribed in terms of the Act and that "ill-defined concepts such as relative youthfulness or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness" ought to be eschewed' (para [15] and *S v Malgas* 2001 (2) SA 1222 (SCA) para [9]).

While the prescribed sentencing regime does not therefore exclude consideration of the factors ordinarily taken into account for the purposes of sentencing, it may only be deviated from if weighty considerations justify such a departure (paras [7], [8] and *S v Vilakazi* 2012 (6) SA 353 (SCA); 2009 (1) SACR 552, especially paras [13]–[20]). It can, therefore, be concluded that 'criminal courts have the duty to approach sentence treating each case on its individual merits and mindful of the need to apply the minimum sentence legislation in a manner that does not result in punishment that is disproportionate having regard to the peculiar circumstances of the commission of the offence and the personal circumstances of the offender' (para [9]).

In this case the sentence of fifteen years' imprisonment was set aside and substituted by a sentence of eight years' imprisonment. Factors taken into consideration included that the victim had not been physically injured, the value of the property stolen was relatively small, and the appellant was furthermore disinhibited to some extent by the use of drugs (para [16]).

Also see *S v PB* 2013 (2) SACR 533 (SCA) and *S v GK* 2013 (2) SACR 505 (WCC).

Composite Sentences to be Avoided

Justices van Zyl and Griffiths for the Eastern Cape High Court, Grahamstown, warned against the imposition of composite sentences (or globular sentences) for a number of offences (*S v Masiza* 2013 (1) SACR 121 (ECG) para [8]).

A composite sentence not only presents difficulties on appeal when the convictions on some but not all of the offences are set aside, but it also poses problems when an appeal court finds that

there were no substantial and compelling circumstances present to justify the imposition of a sentence lower than the prescribed minimum sentence in terms of the Criminal Law Amendment Act 105 of 1997 (para [8]). A further problem arises when a composite sentence is imposed which is competent on one charge, but incompetent on another (para [9]).

More appropriate means for mitigating the cumulative effect of separate sentences is either to order that they run concurrently, or to 'proportionally reduce each sentence imposed on those counts which do not attract a minimum sentence so as to meet the exigencies of the case' (para [8]).

Malicious Prosecution

The respondent in *Minister van Polisie v Van der Vyver* (861/2011) [2013] ZASCA 39 (28 March 2013) was acquitted of the murder of his girlfriend on 29 November 2007. (The case drew widespread attention and speculation in the media, and neither its facts, nor the unreported decision by the Western Cape High Court will be discussed here.) The respondent consequently claimed damages from the Minister of Safety and Security alleging that the prosecution against him was unfounded and based on malicious intent and objectives on the part of the police investigators involved (para [2]). The Western Cape High Court found in favour of the respondent and the appellant consequently appealed to the Supreme Court of Appeal.

The Supreme Court of Appeal considered the grounds for the respondent's claim, ie that the police were malicious in their investigation of the deceased's murder and in the respondent's subsequent prosecution. The respondent alleged, for example, that the police investigators tampered with the fingerprint evidence, as well as the blood-stained shoeprint found in the deceased's bathroom (para [3]). Furthermore, during the trial, the police investigators alleged that the respondent's fingerprints were found on a DVD cover found near the deceased's body, and that this evidence placed him in the deceased's flat at the time of the murder (para [5]). But expert testimony led during the trial called this into question, as it was clear that the fingerprints showed characteristics typical of latent prints lifted from a rounded object — like a glass — and the fingerprints could therefore not have been lifted from a flat object, like the DVD cover. The Senior Superintendent of the SAPS eventually conceded this under oath during his testimony (para [6]). The trial

court subsequently found that the fingerprints in question could not reasonably have been lifted from the DVD cover, and that sufficient evidence had been placed before the court to indicate the *mala fides*, or negligence, or incompetence of the police investigators involved (para [7]).

The respondent also alleged that the untrue statements made by another investigating officer with regard to an ornamental hammer found in the respondent's possession, ultimately led to the prosecution against him, and that the blatantly untrue statements made by police investigator, Bartholomew, about the blood-stained shoe print found in the deceased's bathroom, further instigated the malicious prosecution against him (para [9]).

In order for an allegation of malicious prosecution to succeed, the respondent must prove a causal connection between the actions of the appellant and the subsequent prosecution against him, and further that these actions and the subsequent prosecution were based on the *mala fides* or malicious intent of the appellant (para [21]; also see *Lederman v Moharal Investments (Pty) Ltd* 1969 (1) SA 190 (A); *Prinsloo v Newman* 1975 (1) SA 481 (A); and *Rudolph v Minister of Safety and Security* 2009 (5) SA 94 (SCA)). With regard to the appellant's intent, only *animus injuriandi* is required, and the intent can also include *dolus eventualis*. It will therefore suffice if the respondent is able to prove that the appellant subjectively foresaw the possibility that his actions might lead to the unfounded prosecution of the respondent (para [21]).

While the court agreed with the respondent and the court *a quo* that the police investigator, Bartholomew, acted with malice against the respondent, it also found that the prosecution against the respondent was not based solely on the evidence produced and statements made by Bartholomew (para [22]). It was clear that the respondent's prosecution had already commenced when Bartholomew produced his evidence and conclusions, and the state further elected to continue with the prosecution against the appellant even after the truth about Bartholomew's deceit emerged (para [23]). The respondent had therefore not proved the required causality between the alleged malicious actions of the appellant's employees and his subsequent prosecution (para [25]).

In addition, the state advocates also indicated on 13 December 2006 that they intended continuing with the prosecution

despite the anomalies with regard to the fingerprint evidence which they, in any event, did not intend using in their case against the respondent (para [36]). Further, while the fingerprint evidence did play an integral role in the prosecution of the respondent from 16 July 2005 (when the prosecution was first initiated) until 13 December 2006, the respondent could not prove any malice on the part of the police investigators responsible for the collection, analysis and presentation of this evidence in the criminal trial (para [37]).

After careful consideration of all the relevant facts with regard to the police investigation in this case, the Supreme Court of Appeal found that the respondent had not been able to prove the factual basis on which his claim for compensation was based, and therefore found in favour of the appellant (para [43]).

Correct Procedure for an Enquiry into an Accused's Mental State and Referral to a Facility as an Involuntary Mental Health User: section 78 of the Criminal Procedure Act 51 of 1977

The accused in *S v Luphuwana* (DH 10/07) [2013] ZAGPJHC 289 (6 November 2013) was charged with assault under the Domestic Violence Act 116 of 1998. On the request of the prosecutor and the testimony of the accused's mother (who was also the complainant in the matter), the magistrate held an enquiry into the mental state of the accused in terms of s 78(2) of the Criminal Procedure Act 51 of 1977. The charges were not put to the accused and he was not asked to plead. The accused's legal representative, who was present throughout the proceedings, did not object to this enquiry being held, nor did he cross-examine the accused's mother with regard to her testimony on the accused's mental state (para [2]).

The accused was subsequently referred to a facility for observation based on the magistrate's finding in terms of s 78(2) of the Criminal Procedure Act 51 of 1977 that the accused may not be responsible for his actions due to mental illness or mental defect (para [3]). The accused was eventually admitted to a facility for observation, and a joint unanimous psychiatric report indicated that he suffered from a cannabis-induced psychotic disorder, but that this affliction was currently in remission. The report also indicated that the accused had been unable to appreciate the wrongfulness of his actions when he committed the offence, and that he should be admitted as an involuntary mental health care

user as contemplated in ss 32 and 33 of the Mental Health Care Act 17 of 2002 (para [4]).

The magistrate then continued to hear the testimony of the investigating officer, which was largely based on hearsay, and made an order in terms of s 78(6)(ii)*(aa)* that the accused was unable to appreciate the wrongfulness of his actions, and was unable to act in accordance therewith. It was also ordered that the accused be admitted as an involuntary mental health user in terms of s 37 of the Mental Health Care Act 17 of 2002 (para [8]). The accused's legal representative did not cross-examine the investigating officer, and the magistrate also did not find the accused 'not guilty' as is required under s 78(6)*(a)* before ordering that the accused be detained as an involuntary mental health user (para [10]).

Justice Coppin for the South Gauteng High Court, Johannesburg, described as 'disturbing' that the magistrate allowed for the state to adduce evidence without the charges ever having been put to the accused or his having been called upon to plead (para [14]). The magistrate further allowed inadmissible evidence and, contrary to s 78(6)*(a)*, found that the accused committed the acts with which he was charged but was not responsible on account of his mental illness (para [15]). This was all the more disturbing as there was nothing on the record to suggest that the accused was unable to understand and participate in the proceedings when he appeared before the magistrate (para [16]).

Section 78(6), it was held, assumes that the accused has the necessary capacity to understand the proceedings and to make a proper defence, that the charge had been put to the accused, and that he pleaded to it. It also assumes that the magistrate's finding on whether the accused committed the act is based on admissible evidence (para [18]). The matter was consequently referred back to the magistrate's court for the correct procedures to be followed before an order in terms of s 78(2) and 78(6) are made (para [21]).

Prevention of Organised Crime Act 121 of 1998

The interpretation and application of s 44 of the Prevention of Organised Crime Act 121 of 1998

The Prevention of Organised Crime Act 121 of 1998, was enacted to combat serious organised crime and to prevent criminals from benefiting from the proceeds of their crimes. In line

with these objectives, s 38 of the Prevention of Organised Crime Act 121 of 1998 ('POCA') authorises a High Court to grant a preservation order in respect of property, believed, on reasonable grounds, to be the proceeds or instrumentalities of criminal offences. Such an order is made without notice to the person whose property is to be seized and preserved: with notice only being given once the order has been served upon the property owner (para [23]). The effect of such a preservation order is to preserve the property to which it applies so that no person may deal in any way with that property unless authorised by the High Court who issued the preservation order. The order, furthermore, remains in place until it is rescinded, a forfeiture order is granted, a request for forfeiture is refused, or until the preservation order expires exactly 90 days from the date on which the notice of the order was published in the *Gazette* (s 40). Ultimately, the state would be entitled to a forfeiture order only to the extent to which the respondent's estate has benefited from criminal activities (s 50 of the POCA).

While the provisions of the POCA serve as an effective tool in the fight against crime, they also authorise a serious erosion of the rights contained in the Bill of Rights. This erosion of fundamental rights is furthermore authorised 'merely on the basis of a reasonable belief that the property targeted was involved in the commission of crime or was its proceeds' (para [24]). However, s 44 of the POCA ameliorates the adverse effect of a preservation order and allows for the High Court who made the preservation order to permit the payment of the reasonable living and legal expenses of the owner of, or any other person holding an interest in the property subject to the preservation order (paras [29], [39]). In order to succeed with a request under s 44, two requirements must be met:

- the respondent must be unable to meet the expenses concerned from his/her property which is not subject to the preservation order; and
- the respondent must have submitted a sworn and full statement of all his or her assets and liabilities and must have disclosed under oath all his or her interests in the property (s 44(2)*(a)–(b)*).

In *National Director of Public Prosecutions v Elran* 2013 (1) SACR 429 (CC); 2013 (4) BCLR 379 (CC) the National Director of Public Prosecutions ('NDPP') obtained a far-reaching preserva-

tion order against the respondent which required him to surrender his entire estate to a *curator bonis*, and preserved 'any property held by him, whether in his own name or not, including funds transferred from South Africa to any overseas account' (para [4]).

The respondent opposed this order and requested the *curator bonis* to provide him with the funds necessary to cover reasonable living and legal expenses. But the *curator bonis* was not satisfied and requested further information (para [5]). The NDPP also opposed an application instituted by the respondent in the High Court for the payment of his monthly living expenses and the sum of R250 000 for legal fees (para [7]). The NDPP contended that all the requirements of s 44(2) must be met for a respondent to succeed, and that the respondent in this matter had:

- property available that was not subject to the preservation order and from which his expenses could be met (para [9]);
- failed to make a full disclosure of his interest in certain property (para [10]);
- failed to provide a sworn and full statement of his assets and liabilities (para [11]);
- failed to comply with the preservation order which required that he (the respondent) continue to make monthly payments under the mortgage bond held at the time the order was made (para [12]).

On appeal against the decision of the court of first instance that the respondent had met all the requirements of s 44 of the POCA and was consequently entitled to reasonable living and legal expenses to be paid from the preserved property, the NDPP contended that a court cannot authorise payment of the expenses if one of the requirements of s 44(2) has not been met, regardless of the circumstances of the particular case (para [34]).

Justice Jafta for the Constitutional Court (Moseneke, Nkabinda and Yacoob concurring) held that such a stringent interpretation of s 44(2) undermines the very purpose it is aimed to serve, and will render the provisions of the POCA inconsistent with the promotion of the right to legal representation. The interpretation advanced by the NDPP would therefore not only render the POCA unconstitutional, but would also lead to absurd results and disempower courts in cases where all the requirements of s 44(2)

have not been met (paras [35], [36]). It was consequently held that s 44(2) must be interpreted to mean that a court may authorise payment of expenses if it is satisfied that the applicant cannot meet these expenses from unpreserved property, and he or she is entitled to receive payment of expenses from the property subject to the preservation order. In exercising this discretion, the court will engage in a balancing exercise, weighing 'the applicant's interest, including the right to legal representation, against the objects of preserving the property subject to the preservation order and preventing the applicant from benefitting unduly from that property' (para [37]). And, it is at the stage of balancing the competing interests that the court may take into consideration factors such as whether the applicant has submitted a list of assets and liabilities, and has disclosed all his or her interests in the property (para [38]). However, the threshold in every case will always be 'that the court is satisfied that the applicant has no property that is not subject to a preservation order and from which the requested expenses may be met' (para [38]).The appeal was consequently dismissed.

A dissenting judgment by Justices Cameron and Zondi (discussed below) held that the requirements set out in s 44(2) of the POCA are not jurisdictional facts, but rather preconditions, and where these preconditions have not been met, a court is barred from exercising its discretion. This dissenting judgment is based on the assumption that ss 26 and 44 are similar (para [54]). See below for a discussion of the difference between s 26 and s 44 of the Prevention of Organised Crime Act 121 of 1998.

The difference between s 26 and s 44 of the Prevention of Organised Crime Act 121 of 1998

In a dissenting judgment in *National Director of Public Prosecutions v Elran* 2013 (1) SACR 429 (CC); 2013 (4) BCLR 379 (CC) — discussed above — Justices Cameron and Zondi submitted that ss 26 and 44 of the Prevention of Organised Crime Act 121 of 1998 are similar. In dispelling this assumption, Justice Jafta for the Constitutional Court (Moseneke, Nkabinda and Yacoob concurring) held that both the structure and the requirements set out in both provisions are materially different (paras [54], [55]).

Section 26 provides for restraint orders to be granted by way of an *ex parte* application by a competent High Court prohibiting any person from dealing in any manner with any property to which the order relates. Similar to s 44(2), s 26(6) provides for the

High Court to order that the reasonable living and legal expenses of the person against whom the order is made be paid from the restrained property. This is possible if two requirements are met: '[I]f the court is satisfied that the person whose expenses must be provided for has disclosed under oath all his or her interests in property subject to a restraint order, and that the person cannot meet the expenses concerned out of his or her unrestrained property' (para [55]). More important than the property, therefore, is the disclosure of an interest in restrained property for the purposes of s 26(6). Section 44(2), on the other hand, requires a list of assets and liabilities that extends beyond the property subject to a preservation order (para [56]). The only similarities between the requirements of the two provisions, therefore, are the required disclosure of interests and the inability to meet expenses (para [57]).

With regard to the structure of the two provisions, Justice Jafta also found that a strict reading of the words 'shall not' and 'and' that appear in both provisions, does not necessarily mean that the requirements of s 44(2) are cumulative and interlinked, as is the case with s 26(6) (paras [58], [59]). Compared to s 26(6), s 44(1) and (2) both have two distinct subsections dealing separately with living expenses and legal expenses. It was consequently argued that the court is not obliged to order provision for both the living and legal expenses in each and every case. The context of s 44, it was held, is rather provided by s 44(1) which confers a discretion on the court (paras [58], [59]). An interpretation which prohibits the exercise of a discretion — irrespective of the extent of consequential injustice — just because a list of liabilities, for example, was not submitted, does not promote the spirit, purport and the objects of the Bill of Rights — which is pivotal when interpreting legislation (para [60]).

Requirements for the rescission of a preservation order in terms of s 44 of the Prevention of Organised Crime Act 121 of 1998

The respondent in *National Director of Public Prosecutions v Nqini* (4190/12) [2013] ZAECPEHC 38 (16 August 2013), applied for the rescission of a preservation order made in terms of s 38(1)*(a)* of the Prevention of Organised Crime Act 121 of 1998. Section 47 of the POCA sets out the requirements for the variation or rescission of a preservation order and requires that the court be satisfied that:

- the operation of the order will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship; and

- the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred.

However, the respondent in this matter did not address these two requirements in his application, and the application was consequently treated as an opposition to the grant of the forfeiture order in terms of s 39(3) of the POCA.

An affected gift in terms of ss 12, 14 and 16 of the Prevention of Organised Crime Act 121 of 1998

In *NDPP v Cunningham* [2013] 3 All SA 97 (WCC) the applicant applied for the confirmation of the provisional restraint order granted against family members of the respondent who allegedly received affected gifts from the respondent (Also see *NDPP v Cunningham* 2012 (2) SACR 591 (WCC)).

Cunningham was a trustee of the MIC Trust and also the majority shareholder and managing director of Webworks (Pty) Ltd. The sale of Webworks (Pty) Ltd to Fidentia for R160 million was negotiated by Cunningham without the knowledge of the minority shareholders. In order to secure the sale and the maximum profit for himself, Cunningham convinced the minority shareholders, before the sale of the company to Fidentia, to sell him their shares in Webworks (Pty) Ltd at a considerably lower price. The NDPP alleged that this constituted fraud as Cunningham had materially misrepresented the true value of the shares, as well as the financial affairs of Webworks to both Fidentia and the minority shareholders (paras [5]–[14]).

In the subsequent delictual proceedings between Cunningham and the minority shareholders, a settlement was reached and Cunningham paid a total amount of R16 million to certain shareholders in instalments, and registered mortgage bonds in favour of the shareholders over immovable property held in his (Cunningham's) name. The NDPP, however, argued that the terms of this settlement agreement and the performance in terms thereof, were an affected gift which constituted Cunningham's realisable property. It was argued that the fifth respondent's claim in terms of this settlement agreement was negated by the fact that Cunningham had no lawful duty of care to disclose his fraud and to share the proceeds thereof, and that the minority shareholders, therefore, had no valid claim (para [25]). A provisional restraint order was consequently granted against the fifth respon-

dent in favour of the NDPP (paras [15]–[18] and see *NDPP v Cunningham* 2012 (2) SACR 591 (WCC)).

The respondents, in turn, denied this, arguing that the NDPP had failed to show that the alleged property transferred was for a consideration considerably lower than the value of the consideration supplied by Cunningham, and that the transfer of property was the result of a compromise made by an order of the court which had presided over the delictual action instituted by the respondents against the applicant (Cunningham). It was also argued that, in the absence of any statutory definition, the ordinary dictionary meaning of the word 'gift' should be used, and that a 'gift' therefore constitutes '. . . a willing [ordinary] transfer of property from the defendant to a third party where no consideration is given in return [no payment is expected in return]' (paras [27]–[33]).

An affected gift, in terms of s 12 of Chapter 5 of the POCA, constitutes any gift made no more than seven years before a fixed date, and includes all property received by the defendant in connection with an offence committed by him or her or any other person, or any property or part thereof directly or indirectly received by the defendant in connection with the offence committed. This includes property held by a person to whom the defendant had made a direct or indirect gift, as well as property transferred, directly or indirectly, for a consideration value which is significantly less than the value of the consideration supplied by the defendant (ss 14, 16, 20(2) of the POCA).

Henney J, for the Western Cape High Court, Cape Town, agreed with the NDPP that the respondent's delictual claim was negated by the fact that Cunningham could not be said to have owed the respondents (minority shareholders) a lawful duty of care to disclose his fraud and to share in the proceeds thereof. The delictual claim, it was held, was based on misrepresentations and the non-disclosure of true facts. And, even if Cunningham had made no misrepresentations to the other shareholders and had disclosed all information about his negotiations with Fidentia, the shareholders would still not have been able to receive their proportionate share of the profit, as the sale was entered into based on Cunningham's fraudulent misrepresentations to Fidentia, and the proceeds from it were therefore acquired by fraudulent means (paras [39]–[46]).

With regard to the question of whether the property transferred constituted an affected gift, it was held that even where the

proceeds of a crime have been transferred to an innocent party, that an innocent party is not protected from the effect or consequences of the crime as the gift remains the proceeds of a criminal offence. '[Thus,] what the [respondents] received [is therefore] susceptible to be restrained as part of the realisable property of Cunningham which forms part of the proceeds of his alleged crime in terms of the provisions of POCA and is an affected gift' (para [48]). This included the mortgage bonds advanced in favour of the fifth respondent, as well as the cash payments made in terms of the judgment in the delictual action against Cunningham (paras [63], [75]).

The Importance of a Probation Officer's Report in the Sentencing of a Minor Accused

Section 71 of the Child Justice Act 75 of 2008 stipulates that, before the imposition of a sentence, a sentencing court must request a pre-sentence report prepared by a probation officer (appointed in terms of the Probation Services Act 116 of 1991). This is necessary as it is 'the best way to obtain relevant information pertaining to a youth, to enable a magistrate to structure a sentence that will best suit the needs and interests of a youth' (*S v Oz* 2013 (2) SACR 138 (GNP) para [6]).

According to Justices Rabie and Thulare in the *Oz* case, such a probation report will allude to the childhood of the accused, whether it was characterised by neglect, lack of discipline or ineffective parenting. It will also shed light on whether the accused has challenges inherent to his faculties, challenges from his family set-up or challenges from the community from which he or she has emerged. Failure to obtain such a probation report before sentencing is a misdirection and denies the sentencing court the opportunity to impose a sentence that would promote the rehabilitation of the appellant (para [6]).

Also see *S v Chetty* 2013 (2) SACR 142 (SCA) where the importance of a probation officer's report was also emphasised for the purpose of sentencing an adult accused who was the primary caregiver of his daughter, and *S v Mankayi* (243/2013) [2013] ZAECGHC 79 (15 August 2013), where the sentencing court took into account previous convictions disclosed in a probation officer's report, that were neither raised nor proved by the state.

Requirements for the Amendment of a Charge Sheet and Indictment

The accused in *S v Mpambanso* 2013 (2) SACR 186 (ECB) was charged with over 200 counts of theft and fraud. These charges were later reduced to 54 separate charges of fraud in a process of attrition between the accused and the state. After both the state and the accused had closed their cases — the latter without having led any evidence — the state applied for the charge sheet to be amended combining all the individual counts into a single count of fraud (paras [2], [3]).

This amendment was sought in terms of s 86(1) of the Criminal Procedure Act 51 of 1977 which provides for a charge to be amended where:

- it is defective for the want of any essential averment; or
- where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment; or
- where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom; or
- where any words or particulars that ought to have been omitted from the charge have been inserted therein; or
- where there is any other error in the charge.

According to the state, the amendment was necessary as there was an error in the charge. This error related to the 'question whether the State has proved on which of the particular counts set out in the indictment the accused has committed any of the offences with which he has been charged' (para [7]). However, Justice Nepgen for the for the Eastern Cape High Court, Bhisho, found that the words 'any other error in the charge' of s 86(1) of the Criminal Procedure Act 51 of 1977, must be interpreted 'with regard to the *eiusdem generis* rule so that it referred to a defect in the charge which was similar to the sort of defects listed earlier in the subsection' (para [7]). Further, a court can only order an amendment of a charge if it considers that the making of the relevant amendment will not prejudice the accused in his defence (para [10]). The onus, here, rests on the state to establish that the accused will not be prejudiced (para [11]).

In this matter, the state did not show that the accused would not be prejudiced in his defence as all the state witnesses had by that stage already been cross-examined and certain aspects of the evidence had not been challenged. The accused had further-

more already closed his case without testifying or leading evidence. The application for the amendment of the charge sheet was consequently dismissed (para [13]).

Strict Compliance with Prescribed Minimum Sentences if no Substantial and Compelling Circumstances Exist

The respondents in *S v Nkunkuma and others* (101/2013) [2013] ZASCA 122 (23 September 2013), were convicted on charges of housebreaking with the intent to rob, robbery with aggravating circumstances and rape in contravention of the provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The first respondent was sentenced to an effective eighteen years' imprisonment, the second accused to three years and the third accused to an effective term of fifteen years' imprisonment.

In arriving at these sentences the sentencing court further found that substantial and compelling circumstances existed as envisaged in s 51(3) of the Act. It was, however, unclear which factors it actually found to constitute substantial and compelling circumstances (para [13]). On appeal, the sentencing court was criticised for considering only the triad of the offence, offender and the interests of society, and balancing these interests against each other. It was emphasised that where no substantial or compelling circumstances exist, a court *must* impose the prescribed minimum sentences. The prescribed minimum sentences should therefore have been imposed on the first and third respondents (para [18]).

With regard to the second respondent's sentence, it was held that while his role had been substantially lesser than that of the others, the effective sentence of three years' imprisonment was woefully inappropriate and shockingly lenient in light of the seriousness of the crimes and the manner in which the crimes were committed. The prescribed minimum sentence of fifteen years' imprisonment should also remain the starting point for the purpose of sentencing for this particular accused (para [20]).

The second respondent was consequently sentenced to an effective term of twelve years' imprisonment, and the first and third accused to two years' imprisonment for housebreaking with the intent to rob, fifteen years' for robbery with aggravating circumstances and life imprisonment on the charge of rape (para [21]).

Also see *S v Boshoff* 2014 (1) SACR 422 (ECG) where the court emphasised that when statutorily prescribed minimum sentences apply, a trial court is not at liberty to impose whatever sentence it considers appropriate on 'a clean slate'. The starting point must always be the minimum sentence as prescribed in legislation (para [10]).

Special Review in Terms of section 304(4) of the Criminal Procedure Act 51 of 1977

The accused in *S v Singh* 2013 (2) SACR 372 (KZD) was convicted of negligent driving and sentenced to a fine of R4 000 or four months' imprisonment. On the insistence of the accused's legal representative, the presiding magistrate referred the matter on special review in terms of s 304(4) of the Criminal Procedure Act 51 of 1977. The accused and his legal representative alleged that the conduct of the presiding magistrate amounted to gross irregularity and bias, that inadmissible evidence had been allowed and there had been unnecessary delays in the finalisation of the case — allegations which the magistrate denied (para [4]).

Justice Khallil for the KwaZulu-Natal High Court, Durban, described this action as highly irregular and 'disturbing' as 'a magistrate who approaches a high court with a view of having proceedings reviewed in terms of s 304(4) of the Criminal Procedure Act 51 of 1977 should, at the least, specifically submit that the proceedings were not in accordance with justice' (para [13]; *S v De Wee and Others* 2006 (1) SACR 210 (NC)). It was held that the magistrate in this instance submitted a matter on special review in the absence of any grounds, and 'allowed himself to be used as an agent for the accused in not only submitting the matter on special review but also in procuring the transcript of the proceedings at State expense and supplying the defence with a copy of same' (paras [14], [15]). This was held to be an abuse of the review process as provided for in s 304(4) of the Criminal Procedure Act 51 of 1977 (para [14]).

Search and Seizure Operations Without a Warrant in Terms of section 4(4) of the Customs and Excise Act 91 of 1964 Declared Unconstitutional

In *Gaertner v Minister of Finance* 2013 (4) SA 87 (WCC), s 4(4) of the Customs and Excise Act 91 of 1964 was declared unconstitutional.

The Customs and Excise Act 91 of 1964 is fiscal; it imposes customs duty on goods imported into South Africa and excise duty on goods manufactured in South Africa (para [18]). These taxes are payable if the goods are intended for consumption in South Africa. Therefore, if goods are merely passing through South Africa in transit to another jurisdiction, no duties are payable (para [19]). Section 4(4) of the Act allows the South African Revenue Service ('SARS') to undertake search and seizure operations without prior notice and without obtaining a search warrant from a judicial officer. Section 4(6) further provides SARS officials and others assisting them in the search and seizure operation with far-reaching powers, including the power to enter premises by force. Although, in its answering papers, the SARS defended the impugned provisions in their entirety, it also conceded that s 4(4)–(6) was constitutionally invalid (para [14]). The SARS's main argument was that the impugned provisions were justified to the extent that they authorised searches without a warrant, whether routine or targeted, of designated premises, but unjustified to the extent that they permitted these searches, whether routine or targeted, of non-designated premises (para [16]). It was also argued that s 4(4) did not permit SARS officers to enter property without the owner's consent, and if an owner declined to allow the SARS access, the SARS officers would need to obtain a warrant to enter and search the premises.

However, the Western Cape High Court found no justification for this argument as the impugned section does not state that the consent of the owner is required: 'It merely gives a blunt power of entry without prior notice' (para [60]). The Act further contains no provisions for the obtaining of a warrant if consent is refused (para [61]). And, if s 4(4) were indeed read to mean that a SARS officer was only to enter and search premises with the consent of the owner, then it was completely superfluous as '. . . statutory authority is not needed to enter and search premises with the free consent of the owner' (para [62]). It was therefore held that s 4(4)–4(6) empowers SARS officers to do all the acts listed in those sections without the owner's consent and without a warrant (para [63]).

But, in terms of the justifications raised by the SARS for the infringement on privacy that these provisions permit, the court agreed that routine searches without a warrant of persons registered and licensed in terms of the Customs and Excise Act, did not make significant inroads into the privacy of those individu-

als because '. . . their reasonable expectation of privacy in relation to such searches is low and because such searches do not resemble criminal investigations' (para [87]). The court concluded that 'a warrant appears to me to be a somewhat pointless requirement for random routine inspections' (para [87]). This included routine inspections of designated premises such as pre-entry facilities, licensed warehouses, and rebate stores, but only to the extent that the search related to the business of operating the pre-entry facility or to the business of the licensed warehouse or rebate store (para [103]).

No justification could, however, be found for the non-routine search without a warrant of premises of registered persons (para [89]). The court further held that the Customs and Excise Act should provide for those instances where a warrant is constitutionally required, and that such a warrant has not been obtained under the relevant provisions of the Criminal Procedure or the National Prosecuting Authority Acts. It was held that: 'SARS should not have to depend on the police in order to obtain warrants for these searches. SARS' answering papers claimed that because of the high volume of customs investigations and their specialised nature, dependence on the police would "effectively stymie" searches for the Act's purposes' (para [106]).

The court also held that there was an urgent need for guidelines for SARS officials operating in terms of the provisions of the Act (para [104]). The following guidance was consequently provided to properly balance the searched person's right to privacy with the SARS's legitimate interest in infringing upon such privacy:

- Entry may only take place during ordinary business hours, unless the SARS officer reasonably considers that the entry is necessary on grounds of urgency.
- The officer should inform the person in charge of the premises whether the search is routine or non-routine. In the case of a non-routine search, the officer in charge must furnish the person with a written statement setting out the purpose of the search. Deviation from this requirement is possible where the officer reasonably considers that there are circumstances of urgency warranting such a deviation.
- Only those officers whose presence is reasonably necessary to conduct the search should enter the premises.
- With regard to the question of whether the commencement of a search should be delayed for the person's legal representa-

tive to arrive, or whether such a person should be informed of his or her right to contact his or her legal representative, it was held that the corresponding provisions of the Criminal Procedure Act 51 of 1977 and the National Prosecuting Authority Act 32 of 1998 do not contain such requirements. Thus, while it is recommended, it is not required. The court merely required that the person in charge of the premises or his or her delegate be allowed to observe and be present during all aspects of the search operation.

- An inventory of all items seized should furthermore be provided and where documents are copied, a list of all the material copied should be made.
- It was also emphasised that decency and order should be strictly observed throughout the search (para [105]).

It was consequently declared that s 4(4)*(a)*(i) and (ii), 4(4)*(b)*, 4(5) and 4(6) of the Customs and Excise Act 91 of 1964 were inconsistent with the Constitution and therefore invalid (para [119]).

Separation of Charges — Housebreaking with the Intent to Rob and Robbery

In *S v Cetwayo* 2002 (2) SACR 319 (E) it was held that housebreaking with the intent to commit an offence is in itself an offence, separate from the actual offence for the purpose of which the housebreaking was committed. However, if the offences relate to 'what is in effect a single incident, they are, unless there is good reason to the contrary, charged as a single offence and a single punishment is imposed' (321).

This, it was held in *S v Maswetsa* (CC 28/2013) [2013] ZAGPPHC 162 (30 May 2013), can no longer hold good after the promulgation of the Criminal Law Amendment Act 105 of 1997 which prescribed minimum sentences for the offences falling within the ambit of the Act (para [3]). For example, the Criminal Law Amendment Act 105 of 1997 prescribes a minimum sentence for a conviction of housebreaking with the intent to rob in Part IV of Schedule 2. In terms of this provision, a first offender should be sentenced to a minimum term of five years' imprisonment; a second offender to seven years; and a third offender to ten years' imprisonment. Robbery, on the other hand, can attract a minimum sentence of fifteen years' imprisonment for first offenders, twenty years for second offenders and 25 years for third offenders (para [3]). A conviction of housebreaking with the

intent to rob can furthermore not be regarded as a previous conviction for the purpose of sentencing on a charge of robbery (para [3]). For this reason the charges must be formulated separately in the charge sheet and combined charges should no longer be allowed (para [4]).

The Impact (If Any) of the Period Spent in Detention Awaiting Trial on the Final Sentence of Imprisonment

The appellants in *Radebe and Another v S* 2013 (2) SACR 165 (SCA) were convicted on three counts of robbery with aggravating circumstances, one count of having contravened s 3 of the Firearms Control Act 60 of 2000 and one count of contravening s 90 of that Act. The first appellant was sentenced to an effective term of 20 years' imprisonment and the second appellant to an effective term of 22 years. They were also granted leave to appeal against their sentences as the period they had spent in prison awaiting trial (two years and four months) was not taken into account (para [2]).

In *S v Brophy* 2007 (2) SACR 56 (W), Justice Schwartzman held that 'the rule of thumb in determining an appropriate sentence . . . [is] to take into account the period in detention awaiting the completion of the trial and double it' (para [11]). This double period, it was held, should then be deducted from the period of imprisonment proposed for sentencing. (For an opposing view see *S v Vilikazi* 2000 (1) SACR 140 (W) 148*a–e*.)

Justice Lewis (Leach and Erasmus concurring) for the Supreme Court of Appeal found that there should be no rule of thumb for the calculation of the weight to be given to the period spent by an accused awaiting trial (para [13] and also see *S v Seboko* 2009 (2) SACR 573 (NCK) para [22]). The personal circumstances of each accused should rather be assessed to establish an appropriate sentence, and to what extent the period spent in prison awaiting trial should impact on the final term of imprisonment (para [13]). The period in detention pre-sentence is therefore 'but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justice' (para [14]).

Also see *S v Malgas and Others* 2013 (2) SACR 343 (SCA) in which it was held that there can be 'no automatic alleviation of a sentence merely because of the long interval of time between the imposition of a sentence and the hearing of the appeal for those

persons fortunate enough to have been granted bail, pending the appeal' (para [20]).

Trial Prejudice as a Ground for a Permanent Stay of Prosecution in Terms of S 342A of the Criminal Procedure Act 51 of 1977

In *Mamase v National Director of Public Prosecutions and Others* 2013 (2) SACR 491 (ECG), the applicant and her husband applied for a permanent stay of prosecution under s 342A of the Criminal Procedure Act 51 of 1977. They were both indicted for five offences under the Prevention and Combating of Corrupt Activities Act 12 of 2004, and were also charged with one count of fraud together with a company of which they were the directors (para [2]). The applicants first appeared during March 2005, after which the charges were provisionally withdrawn on 16 October 2009. An indication was given, however, that they could again be charged in the future. The applicants subsequently applied for a permanent stay of prosecution on 13 February 2012, and the Deputy Director of Public Prosecutions signed a new indictment on 20 August 2012 (para [2]).

This case has a long and protracted history characterised by numerous delays. For example, the four co-accused initially charged together with the applicant were later removed and certain of them agreed to testify on behalf of the state (para [9]). The applicant and her husband then challenged the jurisdiction of the court which was set down for hearing, and by the time that the Supreme Court of Appeal had made a decision on the matter, a new prosecutor had been appointed to the case (paras [10], [11]). By this stage, a decision had also been made not to continue with the prosecution of the applicant's husband due to his ill health and a plea and sentence agreement that had been entered into between the state and another former accused (para [11]). Thereafter, the Directorate of Special Operations ('DSO'), who had borne the sole responsibility for this case, was disbanded, and the prosecutor seconded to the case was deployed to the Organised Crime Unit. This matter did not fall into the organised crime category, but the prosecutor had then already been transferred to the Specialised Commercial Crime United ('SCCU') which also assumed responsibility for the case (paras [13]–[15]). A considerable time was further spent on locating and consulting with potential state witnesses, some of whom lived in Australia and, for various reasons, had difficulty in finalising their

travel arrangements to South Africa (paras [15]–[22]). All these procedural and practical hiccups contributed to the applicant's drawn-out prosecution.

The applicant argued that she had been severely prejudiced by these delays, in addition to having been 'socially and professionally compromised' (para [26]). She further claimed that 'the lapse of time since the alleged criminal conduct has rendered it impossible for her to have a fair trial', and that it 'would be impossible for her to investigate new allegations in [the most recent] indictment after the lapse of nine years' (para [27]).

However, Justice Roberson for the Eastern Cape High Court, Grahamstown, found that while these delays were unfortunate, they were not unusual and related largely to systemic problems encountered by the National Prosecuting Authority (paras [39]–[41]). The applicant was, furthermore, not in custody, and her liberty and security had therefore not been affected (para [44]). Finally, as the latest version of the indictment had a similar factual foundation as the earlier indictment, the applicant's argument with regard to trial prejudice could not stand (para [45]).

It was therefore concluded that the applicant had not succeeded in demonstrating significant trial prejudice, and that the serious nature of the offences with which she was charged warranted further investigation and prosecution (paras [47]–[49]).